SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 159.

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

STATEMENT.

On August 1, 1902, the schooner "William Neely," alleged in the declaration (R., 13) to belong to residents and citizens of Maine, and engaged in the coastwise trade between Virginia and New England and then commanded by Abram P. Thompson, the plaintiff in error, was bound in from sea to Norfolk and was hailed by Joseph J. Darden, a licensed Virginia pilot, who tendered his services as such. They were declined. Thereupon Darden brought assumpsit against Thompson in the court of law and chancery of Norfolk city for $87.75, the amount fixed by the Virginia pilot statute.

Thompson demurred to the declaration, contending thereby that the Virginia statute was invalid on various constitutional grounds set out in the demurrer (R., 14).

The lower court, without considering the others, held the statute void as in conflict with section 4237, United States Revised Statutes, forbidding discrimination in pilotage rates between vessels sailing between the ports of one State and vessels sailing between the ports of different States (R., 2). Hence it sustained the demurrer and entered judgment for Thompson, the defendant (R., 15).

Under the Virginia practice a writ of error is not a matter of right. A party desiring it files a petition in the appellate court, which he may adopt as his opening brief, and to it he annexes a copy of the record. Hence, as Darden desired a review of the lower court decision, he filed a petition attempting to show error and to it attached a copy of the record up to and including the final judgment against him, and these papers constitute the first sixteen pages of the record in this court.

The Virginia court of appeals reversed the decision of the lower court, held the statute to be valid, and remanded the case, with directions to overrule the demurrer, permit the defendant to plead, and for further proceedings not inconsistent with the opinion (R., 18; 19 *et seq.*). This not being a final judgment, a trial was necessary. It resulted, as a matter of course, in a verdict for the plaintiff. Thereupon defendant, by motion in arrest, raised the same constitutional questions that had been raised by the demurrer (R., 24). He also raised the same question by offering an instruction and excepting to its refusal (R., 26). Judgment, however, was entered for the plaintiff for his pilotage fee (R., 25).

Under the Virginia practice a second appeal only takes up those parts of the record not already there under the first appeal (Va. Code, sec. 3463). Hence when Thompson desired to review this last judgment he, too, had to file a petition in the Virginia court of appeals and attach to it a transcript of the additional record. His petition is on page 17 of the record, and to it is attached a transcript of the new

record (R., 18–28). The opinion of the Virginia court of appeals is on page 19 of the record. (See also 101 Va., 635; 44 S. E., 755.)

This petition and transcript were filed in open court, but the court, being of opinion that the judgment was plainly right, refused a writ of error and supersedeas (R., 28–29).

This exhausted the defendant's opportunities of review and was a final judgment reviewable by this court. Accordingly the defendant filed a petition for a writ of error, with an assignment of errors, and the writ was allowed and bond approved by the president and presiding judge of the Virginia court of appeals (R., 30–33).

ASSIGNMENT OF ERRORS.

First. The supreme court of appeals of Virginia erred in reversing the judgment of the court of law and chancery of the city of Norfolk on the demurrer, and holding the Virginia pilot law not to be in conflict with the Constitution of the United States. The validity of said law was denied and drawn in question by the defendant in error on the ground of its being repugnant to the Constitution of the United States and in contravention thereof in the following particulars:

1. It is in conflict with section 9, article 1, of the United States Constitution, wherein it is provided that:

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of

different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article 4, section 2, paragraph 1, of the United States Constitution, wherein it is provided that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty, or property without due process of law.

5. It is in conflict with section 4236 of the United States Revised Statutes, which provides as follows:

"The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article 1, section 8, paragraph 3, of the United States Constitution, which provides that Congress shall regulate commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons.

Second. The said court erred in refusing a writ of error and supersedeas to the court of law and chancery, which court refused to instruct the jury as prayed by this defendant in

bill of exceptions No. 1, and also refused to set aside the verdict and grant a new trial on the grounds set out in bill of exceptions No. 2; also overruled the defendant's motion in arrest of judgment.

All these different motions and requests of the defendant raised the question of the constitutionality of the Virginia pilot law on the same grounds as those just above set forth.

Of these it is proposed to discuss only the first, second, and fifth.

The Virginia pilot law is contained in sections 1955–1990 of the Code of 1887.

The important ones are sections 1965, 1966, 1967, 1969, and 1990, which are as follows:

"SEC. 1965. *What Vessels to Take Pilots, and Where.*—The master of every vessel (other than a coasting vessel having a pilot license), inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, and any such vessel outward bound, shall take the first pilot that offers his services at Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, to sea; and any master, refusing to do so, shall immediately pay to the said pilot full pilotage from the sea to Newport News, Smith's Point, Yorktown, or Norfolk, or from said ports to sea, as the case may be; but no master of a vessel coming from sea shall be compelled to take a pilot after arriving within the line at which Cape Henry bears west of south: *Provided, however,* That any registered vessel arriving within the line of Cape Henry bearing west of south, without having taken a pilot, bound for Norfolk, Newport News, or Richmond, shall not be liable for pilotage; but the master may pilot his own vessel to Hampton Roads, and there employ any steamboat or towboat to tow his vessel to her port of destination: *Provided,* That in no instance shall any master be allowed to employ any steamboat or towboat below Hampton Roads without paying full pilotage to the first regular pilot that offers his services to said vessel; and any master so employing a steamboat or towboat below Hampton Roads without a pilot on

board of such vessel, when one shall have offered his services, shall be liable to the penalty prescribed in section nineteen hundred and sixty-three. This provision shall apply to inward bound vessels."

"SEC. 1966. *Where Employment of Pilots Not Required.*—No master shall be required to have a pilot to conduct his vessel or steamboat above Newport News, Yorktown, Mobjack bay, Urbanna, or Smith's Point, but he may, himself, or by any person regularly employed on board, pilot his own vessel, or he may employ the services of any towboat, to tow his vessel to her port of destination above any of the above-named points."

"SEC. 1967. *Issue of License to Coasting Vessel by Pilots' Agent at Norfolk and Richmond; Pay of Agents.*—Pilots shall appoint agents, one for Norfolk city and one for Richmond, who shall grant licenses to coasting vessels trading in all the rivers of this State; for which licenses such agents shall receive ten cents per ton for one year; and coasting vessels having such licenses shall be free to sail without pilots to or from sea; but all vessels sailing under a coasting license, of the burden of seventy tons or more, coming from or going to sea, without having obtained a license from such agent, shall be subject to the same regulations and pilotage as registered vessels belonging to citizens of the United States."

"SEC. 1969. *Rates of Pilotage.*—Pilots shall have pilotage at the following rates: For every vessel owned by a citizen of the United States, and for every vessel owned by any citizen or subject of any foreign State, whose vessels are by treaty placed on the same footing as vessels of the United States, if the vessel be spoken or boarded to the east of Cape Henry, there shall be paid for each foot the vessel draws, as follows: From sea to Smith's Point, West Point, Newport News, Norfolk, or any place between Smith's Point, West Point, Newport News or Norfolk, vessels drawing ten feet and under, two dollars and fifty cents; vessels drawing thirteen feet and over ten feet, three dollars; vessels drawing fourteen feet and over thirteen feet, three dollars and fifty cents; vessels drawing sixteen feet and over fourteen feet, four dollars; vessels drawing over sixteen feet, four dollars and fifty cents. If the vessel be boarded or spoken twenty miles or more eastward of Cape Henry, twenty-five cents per foot shall be added to the foregoing rates. There shall be paid the same pilotage from Smith's Point, West Point, Newport News, or

Norfolk, or any intermediate point to sea, as from sea to those places; and from Newport News to Jamestown, or any place between Newport News and Jamestown, one dollar and thirty-five cents per foot; from Newport News to Richmond, or any place between Jamestown and Richmond, two dollars and fifty cents per foot; and the same rates of pilotage shall be paid from said places, respectively, down. Vessels coming from sea to Hampton Roads and thence to any port in Maryland, shall be subject to the same rate of pilotage as vessels bound from Newport News to sea. All vessels coming to Hampton Roads, seeking, in ballast, shall only pay one-half pilotage in and one-half out: *Provided, however*, That if such vessel coming to Hampton Roads, seeking, is afterwards chartered to load in any port or place in this State, she shall pay the usual pilotage in and out as though she had come to a direct port. All steamers calling in any port or place in this State for the sole purpose of coaling, shall only pay one-half pilotage in and one-half pilotage out. All vessels that go from Norfolk to Newport News to load or to finish loading, and all vessels that go from Newport News to Norfolk to load or finish loading, shall, if they take a pilot (which shall be optional with the master), pay a fee of ten dollars to the pilot for transporting any such vessels to or from either place."

"SEC. 1990. *Vessels on Potomac Excepted from Pilotage.*—Nothing in this chapter shall be construed to apply to vessels bound for any point on the Potomac; and no vessel, bound to or from any point on the Potomac, shall be required to pay pilotage. But if she does take a pilot, she shall pay the regular rate of pilotage to Smith's Point."

An analysis of these statutes shows that all vessels (except coasting vessels with a pilot license) which are inward bound from sea must take a Virginia pilot as far as Smith's Point (the mouth of the Potomac), Yorktown, Newport News, or Norfolk, or any intermediate point. Also all vessels outward bound to sea must take a Virginia pilot as they pass these points, no matter where their voyage commences.

An analysis of sections 1966, 1967, 1969, and 1990 shows that the following are expressly exempted from taking pilots:

1st. All vessels from Newport News, Yorktown, Urbanna, or Smith's Point to any points above those points, respectively.

2d. Vessels holding a coasting license.

3d. Vessels bound to any point on the Potomac.

It also appears that the following vessels are exempt from pilotage, for the reason that such vessels would not be inward bound from sea, and the further reason that no pilotage rates are prescribed by the statute for such voyages:

1st. Vessels plying between Virginia ports.

2d. Vessels plying between Virginia and Maryland ports.

The following vessels, under the pilot law, have a reduced rate under sections 1969 and 1975:

1st. Vessels coming to Hampton Roads seeking (half pilotage).

2d. Vessels coming to any port of this State to coal (half pilotage).

3d. Vessels between Newport News and Norfolk, loading or finishing loading (optional whether to take any pilot or not, and a fee of only $10 if a pilot taken).

4th. Vessels from the naval anchorage to the navy yard (a special rate of $20).

Another remarkable provision of the Virginia pilot law is that even if an inward-bound vessel employs the services of a tugboat to bring her in, in which case she could not under any circumstances need a pilot, yet she must, under this statute, take a pilot aboard, although all the pilot would have to do would be to sit up on deck and watch the tug bring the vessel in (sec. 1965).

1. THIS STATUTE VIOLATES ARTICLE 1, SECTION 9, CLAUSE 6, OF THE FEDERAL CONSTITUTION, WHICH PROVIDES THAT NO PREFERENCE SHALL BE GIVEN BY ANY REGULATION OF COMMERCE OR REVENUE TO THE PORTS OF ONE STATE OVER THOSE OF ANOTHER.

It has been held that this clause of the Federal Constitution applies both to Federal and State legislation.

Passenger Cases, 7 How., 414.

And it applies to any legislation that works beneficially to the ports of one State over those of another.

"Preference can only be given the ports of a State by giving advantages to those engaged in doing business through such ports. It is not the port, but the commercial transactions carried on by or through its medium, that are to be given the benefit of such relations. Neither is it the individual port that is not to be preferred, but the State or its citizens through its ports. Nor do I understand that such preference must be confined to vessels entering or leaving such ports, clearing from or being bound to them, any more than being owned and being registered at them, to justify an application of this prohibition. All are protected from being placed in any less favorable position in any commercial transaction on account of the ports of any State through which their business is done than those whose relations are with a port of a different State. Vessels are recognized and known as belonging to certain ports according to the residence of the principal owner, and any preference shown them, or any unequal burden imposed upon them on account of the State in which they are owned, is certainly showing a preference for the ports of the more favored State, whether expressed in so many words or not—the effect is the same. Had the statute exempted all vessels arriving from or bound to Texas, and compelled payment from those arriving from or bound to Louisiana, can there be any question but what preference has been given to the ports of one State over those of another, although ports may not have been mentioned? And does not this hold equally as good if the difference is on account of the State where the vessel is owned? I con-

sider it does. I am satisfied that if Congress should declare all vessels owned within the State of New York might enter and leave any port without the payment of fees, pilotage, or of any other character, while others owned elsewhere should be compelled to such payment, then this clause could be justly interposed as prohibitory; and I consider that the same restriction rests upon the legislation of a State relating to foreign commerce as in the present question. A State cannot do indirectly what it is prohibited from doing directly."

The Lizzie Henderson, F. C. No. 17726a.

Under the terms of section 1965 of the Virginia statute every vessel inward bound from sea must take a Virginia pilot; and under section 1963 it is made a crime for any person not a Virginia pilot, or for a Virginia pilot after removing from the State, to conduct a vessel to or from sea, and it is even made a crime in the master of any vessel to employ any one but a Virginia pilot for that purpose.

The statute works a discrimination in favor of voyages between Virginia ports and Maryland ports. No pilot fee is imposed for such a voyage, and yet a pilotage fee is imposed for all vessels coming from sea to a Maryland port, which includes all vessels coming from other States. Therefore, under this law, a vessel plying between a Virginia port and a Maryland port is exempt from pilotage, unless it voluntarily chooses to employ a pilot, and a vessel coming from the port of any other State to a Maryland port is required to pay pilotage. It is submitted that this renders the statute invalid.

Guy vs. Baltimore, 100 U. S., 434.
Brewing Co. vs. McGillivray, 104 Fed., 258.
John M. Welsh, 2 Fed., 364.
Booth vs. Lloyd, 33 Fed., 593.

2. THE VIRGINIA PILOT LAW IS IN CONFLICT WITH SECTION 4237 OF THE UNITED STATES REVISED STATUTES.

This section provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

Notwithstanding the construction wrung out of this statute in the petition for a supersedeas (R., 1–10), it is submitted that the meaning of the statute is really too plain for discussion. When it expressly says that there shall be no discrimination between vessels sailing between the ports of one State and vessels sailing between the ports of different States, there is no room for putting any construction upon it, except the construction that the statute means to prevent any discrimination between those two classes of vessels as classes.

There are many rules of construction laid down for the purpose of finding the meaning of statutes and legal documents, but there is one rule which overrides all others. That is, that when the language of the statute is perfectly plain the legislature is supposed to have meant what it said; and there is no room for rules of construction.

"We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is

nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction."

U. S. vs. Hartwell, 6 Wall., 385.

But we are not left to conjecture even in the application of so plain a rule of construction as this.

"Taking these objections in the order stated, the first relates to the restrictions contained in section 4237 of the Revised Statutes. This plainly divides vessels into two classes, vessels sailing between the ports of one State, and vessels sailing between the ports of different States; or, in other words, vessels bound from any port to another port in the same State; or those bound to some port in a State other than the one from which they sail, and declares that between these two classes of vessels there shall be no discrimination. It does not intend to prevent discrimination between individual vessels of either of these classes based upon size, draft of water, or other proper grounds, but evidently is to prohibit any State from so far giving preference to commerce carried on between its own ports as to establish a discrimination between two vessels based upon the fact that one vessel is engaged in a voyage to a port beyond its limits, and the other is not. That this was the intent of the law becomes more apparent when upon examining the pilotage laws in force at the time of the passage of this act, July, 1866, we find that certain States—Massachusetts, Georgia, and perhaps some others—had laws in force embodying this very discrimination in favor of vessels sailing between ports within their own States, and against vessels sailing between such ports and those of other States. The discrimination in the case under consideration is not based upon such state of facts, and I do not therefore consider it in conflict with its provisions."

The Lizzie Henderson, F. C. No. 17726*a*.

The fact is that this ground of objection to the statute is decisively settled by the case of *Spraigue vs. Thompson*, 118

U. S., 90, which classified the vessels just as the statute classifies them. In fact it goes even further. It holds that a similar statute was void not only because it exempted from the pilotage laws vessels plying between the ports of the State which made the laws, but also vessels plying between the ports of that State and the ports of two neighboring States. The question was raised under the construction of the pilotage law of the State of Georgia. That law exempted from its compulsory features coasters in the State, which can mean nothing else than vessels engaged in the coastwise trade from port to port in the State, also vessels sailing between the ports of Georgia and the ports of South Carolina, and also vessels sailing between the ports of Georgia and the ports of Florida. But because it required the payment of pilotage by vessels sailing between the ports of Georgia and the ports of all the other States in the Union except those three, the law was held to violate this provision of the Revised Statutes.

So, too, in the case of the *Undaunted*, 37 Fed., 662. A California statute exempted not only vessels sailing between the ports of California, but also vessels sailing between the ports of California and Oregon and the ports of California and Washington. The court held the law to be void.

It is not necessary to go far to ascertain the purpose of Congress in the enactment of this statute. The ground on which compulsory pilot laws have been sustained is that, unless they are made compulsory, there will not be a sufficient amount of business to encourage the organization and education of trained men for such a service. This line of thought runs through all the cases which discuss these laws. In other words, pilotage fees are a burden put upon commerce on the theory that, while it might work hardship on the individual, it results in general benefit to commerce treating it as a whole.

This argument applies as well to the internal trade of a State as to the external trade. There is much more need of

pilots for voyages along the narrow and crooked channels of the rivers than for voyages in from sea, and the Virginia statute prescribes pilotage rates for some such voyages (for example, Newport News to Richmond), but without the compulsory feature.

"The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality, and is made aware of the dangers of such locality, if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs, or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity—his skilled knowledge—very seriously in the course of a long voyage. He should make a few of the first 'trips,' as they are called, after his return, in company with other pilots more recently familiar with the river."

Atlee vs. Union Packet Co., 21 Wall., at page 396.

The present system of light-houses and buoys is so perfect, and coast survey charts so accurate that any person can direct even a large draft vessel into Hampton Roads and up the other waters of Virginia as far as the points to which the law requires them to take pilots. After they pass those points, then the real necessity begins; and yet the Virginia pilot law is so framed as to require vessels to take pilots only up to the points where their services really begin to be necessary. The extent and accessibility of Hampton Roads and the ports near it are the boast of tidewater Virginia. Therefore, if pilotage is still one of the infant industries and the state of commerce still such that a compulsory pilotoge system is necessary, it would seem clear that its burdens should not be made to fall solely upon outside commerce, but that domestic commerce also should bear its part.

An illustration may make this inequality clearer. From the capes of Virginia to Norfolk is about twenty-seven miles. The chart shows that the channel, certainly as far in as Hampton Roads, is straight and wide. From Hampton Roads to Norfolk it is comparatively straight, though narrower than the channel from Hampton Roads to sea. Under the Virginia pilot law a vessel bound to Norfolk must take a pilot. Under the terms of section 1965, even if the pilot fails to hail her at the required point and she gets within the capes, she still, while she may refuse a licensed pilot, cannot employ a tugboat or any other than a licensed pilot. On the other hand, a vessel bound from Richmond to Norfolk need not take a pilot. There is not an actual port of any commerce in Virginia from which a vessel bound to Norfolk is required to take a pilot. There is not a port of any commerce outside of Virginia, except Maryland, from which a vessel is not required to take a pilot. From Richmond to Norfolk is about one hundred and twenty miles, along a narrow and tortuous channel, where a pilot is very much more necessary than from the Virginia capes to Norfolk.

The ground on which the validity of the law is main

tained in the petition for a supersedeas and upheld by the Virginia court of appeals seems to be that under the language of section 4237 of the Revised Statutes a State pilotage law may make as many discriminations as it pleases between vessels bound on different voyages, provided only it makes no discrimination between vessels pursuing substantially the same voyage. To put this in more concrete form, they contend that because the Virginia pilot law only imposes compulsory pilotage on vessels bound to or from sea, which pilotage would apply to a vessel bound from a Virginia port in from sea as well as to a vessel bound from other States in from sea, therefore the pilot law is valid. The answer to this is manifold.

1. The terms of section 4237 apply as well to cases where pilotage is voluntary as to cases where it is compulsory. Under section 1963 of the Virginia pilot law it is provided as follows:

"If any person, not authorized by law, or any pilot, after removing from the State, undertake to conduct or pilot a vessel to or from sea, or to or from any port or place in Virginia, or if any master or person on board any steamboat or towboat tow a vessel to or from sea, or to or from any port or place in Virginia, except as authorized by this chapter, without having a pilot on board of such vessel (if one shall offer his service), he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, at the discretion of the jury, be imprisoned in jail not more than three months or fined not exceeding two hundred dollars. Any master employing any person not authorized by law, or any pilot who has removed from the State, to act as a pilot of his vessel, shall pay one hundred dollars to any regular branch pilot who shall sue for the same. Warrants for such offenders may be issued, upon the oath of any party complaining, by a justice of any county or mayor or justice of any city in this State, in which such offender may be at the time; and, upon proof of probable cause, the offender shall be bound, with surety in due form of law, to appear at the next term of the circuit court of said county or corporation

court of said city for trial of such misdemeanor; and the circuit court of said county or corporation court of said city shall have jurisdiction for the trial thereof."

Hence under this provision there is no alternative but to employ a licensed pilot or to take no pilot at all. The master must pilot his own vessel or take a licensed pilot, and this rule applies to all voyages, whether from sea or not. Hence, even where the pilotage is not ostensibly compulsory, only a narrow margin of election is allowed.

2. The language of section 4237 is not susceptible of the construction contended for. It expressly draws the line as to vessels sailing between the ports of one State and vessels sailing between the ports of different States. How, then, can it be contended that the only discrimination which it intended to forbid is discrimination between vessels engaged on practically the same voyage? How can a voyage between the ports of one State be the same as a voyage between ports of different States?

But the act will not bear even the test contended for by its advocates. Under it a vessel sailing from the Virginia capes to Norfolk must pay pilotage if hailed at the proper point. A vessel sailing from Cape Charles City to Norfolk need not pay pilotage, though she traverses practically the same waters. A vessel sailing from the capes of Virginia to Baltimore must take a pilot as far as Smith's Point. A vessel sailing from the capes of Virginia to Alexandria need not take a pilot, though she traverses exactly the same waters as the first and the long and difficult navigation of the Potomac in addition. A vessel from West Point to sea must take a pilot. A vessel from West Point to Norfolk or Cape Charles City need not take a pilot.

3. The contention that there is no discrimination between vessels inward bound from sea, because vessels sailing from Virginia ports inward bound would have to take a pilot just

as vessels sailing, for instance, from New England ports, is based on the assumption that there are Virginia ports on the seacoast. As a matter of fact there is but one (Chincoteague), and that an insignificant one with no commerce. A glance at the map will show that from Cape Henry to the North Carolina line is a long, straight stretch of seacoast, with absolutely no indentations, no port, and no possibility of ever having a port. So, too, from Cape Charles north to the Maryland line, the chart shows some indentations, but no ports, and no possibility of ever having any, for the peninsula forming the eastern shore of Virginia is narrow and its commerce is handled from the ports on the bay side, and always will be. These are facts of which this court takes judicial notice.

Brown vs. Piper, 91 U. S., 37.
Minnesota vs. Barber, 136 U. S., 313, 330.

Thus the question reduces itself simply to the issue whether a State can do indirectly what it is forbidden to do directly; whether it can word a statute in such a way as to apply ostensibly to waters where it has no ports as an excuse for making it apply to other States having ports. If Virginia had said directly that all vessels coming in from sea from other States should take a pilot, and no vessels coming from Virginia ports from sea should take a pilot, the draftsman of such an act would have been laughed at as ignorant of the geography of his own State, and the act would have been void on its face. Can the same result be accomplished by slightly varying the language? On the contrary, this court has decided more than once that the constitutionality of an act must be judged not by its intent, but by its effect.

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not re-

pugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court."

Minnesota vs. Barber, 136 U. S., 313.
Voight vs. Wright, 141 U. S., 62.

This question would seem to be set at rest by *Brimmer vs. Rebman*, 138 U. S., 78. There an act of Virginia reciting in its preamble the purpose of protecting its citizens from unwholesome meat provided that any meat slaughtered more than one hundred miles from the place where it was offered for sale should be subject to inspection by an inspector appointed for the purpose, and a fee was established for such inspection, which went to the inspector and not to the State. This made all meat brought from other States more than one hundred miles from the boundary line of Virginia subject to inspection, but it also made a great deal of meat slaughtered in Virginia itself subject to inspection. This court held that it would judge the act by its effect, not by the recitals of its preamble, and that it was void, as it subjected practically all meat from other States to inspection; and it was not saved by the fact that it subjected some meat slaughtered in Virginia. Hence, a statute which results in discrimination against the great mass of interstate voyages is not saved by inserting a clause making a small part of State voyages subject to the same fee.

4. Even on the assumption that there is such an actual or potential commerce from the Virginia coast line, the Virginia act would not be helped. In such case a vessel could sail from Chincoteague to Virginia Beach without taking a pilot, while a vessel from Maine to Norfolk would

be compelled to take a pilot. There is nothing in the language of section 4237 of the Revised Statutes which justifies the construction placed upon it by the pilots and by the Virginia court of appeals.

Much has been said and will be said of the hardship of requiring a State to conform to this statutory regulation, and on this alone practically the argument of the appellee is based.

But where the language of a statute is clear the *argumentum ab inconvenienti* has no application, and, besides, the State can easily avoid the effect of it by amending her law. Section 4237, U. S. Rev. Stats., only applies to interstate commerce, and hence her right to charge pilotage on foreign commerce is not affected. Even as to interstate commerce, the great governmental improvements of our waterways and the great growth of our commerce have rendered compulsory pilotage much less important than in 1851, when the case of *Cooley vs. Wardens*, 12 How., 299, was decided. At that time the right of the Government to spend money for such purposes was strenuously denied by one of the great political parties, and the commerce of the country was so small, comparatively, that compulsory pilotage was important, as it took a fee from every vessel to support a pilot organization. Since then the constitutionality of these appropriations is no longer questioned, and the growth of our commerce has been almost inconceivable. The reason of the policy which prevailed at the decision of that time prevails no longer. Even in that case the decision was rendered by a bare majority. Hence, if the effect of this act is to render necessary the abolition or modification of the compulsory system, at least so far as it affects interstate commerce, no great harm can be done. The State has an easy alternative. She can make pilotage compulsory both on inter-state and infra-state voyages, and give in both cases the right to take out annual licenses, as provided by section 1967 of her pilotage law. The result would be, that

vessels trading between Virginia ports would take out a license, and as they are, as a rule, small vessels, the burden would not be very great. If the State is indisposed to do this, then she ought not to object to abolishing the compulsory feature as against inter-state vessels as well as against infra-state vessels. The pilots would still have left their fees on foreign vessels and their fees from masters of interstate vessels who do not feel competent to pilot their own vessels. Thus the purposes of this statute would be accomplished, which are, to distribute the burden of the pilot system equitably upon both domestic and interstate commerce.

As a result of this attempt of the State to put the burden all on one class of trade, the pilotage rates have been made very heavy. Under section 1969, vessels drawing ten feet and under pay $2.50 per foot, while vessels drawing over sixteen feet pay $4.50 per foot. A peculiarity of this law is that the excessive charge is not put on simply for the excessive draft, but is put on for the entire draft. In other words a vessel drawing ten feet must pay a pilotage fee of $25.00, whereas a vessel drawing sixteen feet must pay a pilotage fee of $72.00. A large modern steamer coming in light would probably draw just about sixteen feet. This would make her inward pilotage $72.00. When she starts out loaded, she would probably draw twenty-five feet; in fact, some of them have gone out drawing as much as twenty-eight and twenty-nine feet. At the rate of twenty-five feet this would make her outward pilotage $112.50, or a total pilotage for the round trip of $184.50. The large new schooners that are now being built, when loaded with coal, nearly all draw twenty-seven or twenty-eight feet. It was the evident intent of Congress to prevent this heavy burden from being placed solely on outside commerce, and to make State commerce bear at least its share. As domestic vessels navigating the inland waters are necessarily of much lighter draft, there would be nothing inequitable in making them bear a small proportion.

It has been said above that the theory on which compulsory pilotage laws have been sustained is that it is necessary to make all vessels take pilots in order to keep up a pilotage organization, and that a pilotage organization is necessarily, in the language of the appellant's petition, a choice of the lesser evil as compared with frequent salvage (R., 5).

The Virginia pilot law, however, is counter even to this theory; for section 1967 permits vessels engaged in the coasting trade to take out an annual license and dispense with the employment of a pilot. There could be no more patent admission of the ease of navigating Virginia waters without a pilot; and the fact proves that, with the modern system of internal improvements, pilots are no longer necessary. If the master of a coasting schooner is competent to navigate his vessel in with a license, he is certainly competent to do it without a license.

3. THE PILOT LAW VIOLATES SECTION 4236 OF THE REVISED STATUTES.

This statute provides:

"The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

It may be a matter of some difficulty to say exactly what shape of water constitutes the boundary between two States, but, in view of the object with which this statute was enacted, it is submitted that Chesapeake bay is in that sense at least a boundary between Virginia and Maryland. The line, as will be remembered, at one point runs from Smith's Point across in rather an irregular line to the southern end of Tangier island, and then for some distance up Pocomoke sound and Pocomoke river, following practically the *filum*

fluminis of these two latter bodies of water, which are part of Chesapeake bay.

This question has come up more than once in connection with the pilot laws of Pennsylvania and Delaware, both of which are situated on Delaware river, but on the same side of the river, and the courts have held that in the sense of this act Delaware river is a boundary between Pennsylvania and Delaware.

Clymene, 9 Fed., 164; 12 Fed., 346.
Abercorn, 26 Fed., 877; 28 Fed., 384.
South Cambria, 27 Fed., 525.

Under the terms of this section of the Revised Statutes, an incoming vessel has the right to take the pilots of either of the two States which border on such waters to points situated on such waters. It is clear from the language of the statute that the point to which the master of a vessel has a choice of pilots need not itself be opposite that part of the waters which are the boundary. If it is on those waters, though at a point higher up, then the master of the incoming vessel has the right to choose his pilot. The Virginia law, however, expressly requires him to take a Virginia pilot alone, and deprives him of his right in such case given him by such statute of choosing a Maryland pilot. In this respect the Virginia law is unconstitutional.

The decision should be reversed.

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NORFOLK, VA., *January* 3, 1905.